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SC6587

EXECUTIVE COUNCIL
Twentieth Ordinary Session
23 - 27 January 2012
Addis Ababa, ETHIOPIA

EX.CL/710(XX)
Original: English

**PROGRESS REPORT OF THE COMMISSION ON THE
IMPLEMENTATION OF ASSEMBLY DECISIONS ON THE
INTERNATIONAL CRIMINAL COURT (ICC)**

PROGRESS REPORT OF THE COMMISSION ON THE IMPLEMENTATION OF ASSEMBLY DECISIONS ON THE INTERNATIONAL CRIMINAL COURT (ICC)

I. INTRODUCTION

1. The Seventeenth Ordinary Session of the Assembly of the Union held in Malabo, Equatorial Guinea on 30 June and 1 July 2011 considered the Progress Report of the Commission on the implementation of the Assembly Decisions relating to the International Criminal Court (ICC) and the recommendations of Council.

2. Following due consideration of the recommendations of the Executive Council, the Assembly adopted Decision Assembly/AU/Dec.366(XVII) and decided, *inter alia*, as follows:

- “3. **STRESSES** the need to pursue all efforts and explore ways and means of ensuring that the request by the African Union (AU) to the United Nations (UN) Security Council to defer the proceedings initiated against President Bashir of The Sudan, in accordance with Article 16 of the Rome Statute of International Criminal Court (ICC) on deferral of cases by the UN Security Council, be acted upon, and in this regard, **REITERATES** its request to the UN Security Council; and **REQUESTS** the African members of the UN Security Council to place the matter on the agenda of the Council;
4. **ALSO STRESSES** the need to pursue all efforts in ensuring that the request by the AU to the UN Security Council to defer the investigations and prosecutions in relation to the 2008 post-election violence in Kenya under Article 16 of the Rome Statute be acted upon to allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation, in line with the principle of complementarity;
5. **REAFFIRMS** that by receiving President Bashir, the Republic of Chad, Kenya, and Djibouti were discharging their obligations under Article 23 of the Constitutive Act of the African Union and Article 98 of the Rome Statute as well as acting in pursuit of peace and stability in their respective regions;
6. **EXPRESSES DEEP CONCERN** at the manner in which the ICC Prosecutor has handled the situation in Libya which was referred to the ICC by the UN Security Council through Resolution 1970 (2011). The Assembly **NOTES** that the warrant of arrest issued by the Pre-Trial Chamber concerning Colonel Qadhafi, seriously complicates the efforts aimed at finding a negotiated political solution to the crisis in Libya, which will also address, in a mutually-reinforcing way, issues relating to impunity and reconciliation. In this regard, the Assembly **DECIDES** that Member States shall not cooperate in the execution of the arrest warrant, and **REQUESTS** the UN Security Council to activate the provisions of

Article 16 of the Rome Statute with a view to deferring the ICC process on Libya, in the interest of Justice as well as peace in the country;

7. **REQUESTS** *the Group of African States Parties in New York and in The Hague as well as the African Members of the UN Security Council to closely follow-up on the implementation of the Assembly's Decisions on ICC;*
8. **ALSO REQUESTS** *the Commission in collaboration with the Permanent Representatives' Committee to reflect on how best Africa's interests can be fully defended and protected in the international judicial system, and to actively pursue the implementation of the Assembly's Decisions on the African Court of Justice and Human and Peoples' Rights being empowered to try serious international crimes committed on African soil;*
9. **REQUESTS** *the Commission to follow-up on this matter and to report regularly on the implementation of the various Assembly decisions on ICC."*

3. The present Progress Report has been prepared with a view to updating the Assembly on developments which occurred since the last reporting period.

II. **CONSIDERATION OF THE REQUEST FOR A DEFERRAL OF THE PROCEEDINGS INITIATED AGAINST PRESIDENT BASHIR OF THE SUDAN**

4. By Resolution 1593 (2005) adopted on 31 March 2005, under Chapter VII of the United Nations (UN) Charter, the UN Security Council referred the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court (ICC).

5. On 4 March 2009, the Pre-Trial Chamber I of the ICC issued a warrant for the arrest of Omar Hassan Ahmad Al Bashir, President of the Republic of the Sudan, for war crimes and crimes against humanity. Furthermore, on 12 July 2010, the Pre-Trial Chamber I issued a second warrant of arrest against the President of the Sudan, on the basis that there are reasonable grounds to believe that he was responsible for three (3) counts of genocide committed against three (3) ethnic groups in Darfur.

6. Following the application for indictment against President Bashir of The Sudan and the issuance of the arrest warrants, the Assembly and the Peace and Security Council of the African Union (PSC) adopted various decisions requesting for a deferral of the proceedings initiated against President Bashir of The Sudan for one year, in accordance with Article 16 of the Rome Statute of ICC.

7. The Assembly Decision was submitted to the UN Security Council in September 2010 by the AU Observer Permanent Mission to the UN and the African Group in New York. However, to date, the issue has not been formally placed on the agenda by the African members of the UN Security Council. It is our understanding that the African Members of the UNSC preferred to place the matter on the agenda after submission of an Aide-Memoire on the actions that would be undertaken by the Government of The Sudan during the period of one (1) year, if deferral is granted.

III. ICC APPLICATION FOR INDICTMENT AGAINST SIX (6) KENYAN OFFICIALS IN RESPECT OF THE 2007 POST ELECTION VIOLENCE

8. On 31 March 2010, the Pre-trial Chamber II of ICC, by majority, issued its decision authorizing the Prosecutor to commence an investigation into the situation in the Republic of Kenya in relation to crimes against humanity within the jurisdiction of ICC committed between 1 June 2005 and 26 November 2009 in the aftermath of the elections. On 15 December 2010, the Prosecutor, after conducting his investigations, submitted to the Pre-Trial Chamber II two (2) applications under Article 58 of the Rome Statute requesting for the issuance of summonses to appear for William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang (case one) and Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali (case two) for their alleged responsibility in the commission of crimes against humanity.

9. The six (6) suspects appeared voluntarily before the Pre-trial Chamber II at the confirmation of charges hearing from 1 to 8 September 2011 and from 21 September to 5 October 2011, respectively. The decision on whether or not to confirm the charges based on whether there is sufficient evidence to establish substantial grounds to believe that each suspect committed each of the crimes specified in the charged, is scheduled for January 2012. If the charges are confirmed, the Pre-Trial Chamber commits the person for trial before a Trial Chamber, which will conduct the subsequent phase of the proceedings, namely the trial.

10. Vide decision dated 26 October 2011, the Pre-trial Chamber II indicated that the decision to confirm or decline to confirm the charges or adjourn hearing shall be delivered within sixty (60) days from 24 October 2011, date of the submission of the last observations of the Defence on the hearing in Case 1 in writing. This has been scheduled for 20 January 2012

a) Request for a deferral of the ICC investigations and prosecutions in relation to the 2008 post-election violence in Kenya

11. Following this application, the Assembly through its Decision Assembly/AU/Dec. 334(XVI) supported and endorsed Kenya's request for a deferral of the ICC investigations and prosecutions in relation to the 2008 post-election violence under Article 16 of the Rome Statute, to allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation in line with the principle of complementarity. By the same Decision, the Assembly requested the UN Security Council to accede to this request in support of the on-going peace building and national reconciliation processes, in order to prevent the resumption of conflict and violence; and requested the African members of the UN Security Council to place the matter on the agenda of the Council.

12. As reported in June 2011, the request for a deferral was duly submitted to the UN Security Council by the Permanent Representative of the Republic of Kenya to the United Nations. Following this request, UNSC under the Chairmanship of China, for the month of March and Colombia, as Chairperson for the month of April 2011, organised a UN Security Council informal dialogue on 18 March 2011 and informal consultations on 8th April 2011 respectively, in order to consider the issue. The

Commission was represented at the informal dialogue held on 18 March 2011 by the Commissioner for Social Affairs, Advocate Bience Gawanas who made a statement on behalf of the AU. The AU Permanent Observer Mission to the UN also attended the said informal dialogue.

13. At the end of the said consultations, the President of UNSC by a letter dated 12 April 2011 informed the AU Permanent Observer Mission to the UN that after full consideration, the members of the UNSC did not agree on the matter.

14. Vide Decision Assembly/AU/Dec.366(XVII) adopted in July 2011, the Assembly reiterated its request to the UNSC to defer the investigations and prosecutions in relation to the 2008 post-election violence in Kenya under Article 16 of the Rome Statute. It is the view of the AU Commission that African members of UNSC had been mandated to ensure that this matter is formally placed on the agenda of the UNSC but this has not been done. By the time of finalisation of this Report, the UNSC had not yet considered the new request for a deferral of the proceedings.

b) Application by the Government of Kenya for challenging the jurisdiction of ICC pursuant to Article 19 of the Rome Statute of the ICC

15. It would be recalled that, pursuant to the provisions of Article 19 of the Rome Statute of the ICC on complementarity, Kenya as a State Party to the Rome Statute of ICC, which has primary jurisdiction over the investigations and prosecutions of alleged crimes against humanity in relation to the 2008 post-election violence had challenged the jurisdiction of the ICC.

16. However, on 30 May 2011, the Pre-Trial Chamber II of the ICC rejected the Kenyan Government's challenges to the admissibility of the two cases brought before the Court in the context of the situation in Kenya. In this regard, the Pre-Trial Chamber II considered that the applications did not provide concrete evidence of on-going proceedings before national judges against the same persons suspected of committing crimes falling under the ICC's jurisdiction. The Pre-Trial Chamber II also considered that the Government of Kenya had failed to provide the Chamber with any information as to the conduct, crimes or the incidents for which the suspects were being investigated or questioned for at the domestic level.

17. The Government of Kenya appealed against the decision of the Pre-trial Chamber II. However, on 30 August 2011, the Appeal Chambers of the ICC confirmed the Pre-trial Chamber II's decisions of 30 May 2011 on the admissibility of the cases and dismissed the appeals filed by the Government of Kenya. It should be noted that the Judgments were adopted by majority with one Judge dissenting.

IV. PREVIOUS RESORT TO ARTICLE 16 BY THE UN SECURITY COUNCIL

18. Article 16 provides that no investigation or prosecution may be commenced or proceeded with for a period of twelve (12) months after the UN Security Council has by resolution adopted under Chapter VII of the Charter of the United Nations requested the Court to that effect. It also provides that the request may be renewed by the Council under the same conditions.

19. This Article has been used by the UN Security Council in only two (2) cases under circumstances that are considered highly controversial and which portray a tendency towards double standards. By UNSC resolution 1422 of 12 July 2002, adopted under Chapter VII, a few weeks after the entry into force of the Rome Statute of the ICC and before the Court had been operationalised in The Hague, the UN Security Council granted a blanket immunity to troop contributing states that are not parties to the Rome Statute in respect of UN forces in Bosnia Herzegovina. The resolution was pushed for by the United States of America and was renewed for a further twelve (12) months on 12 June 2003, at the 4772nd meeting of the UNSC, vide resolution 1487. These two (2) resolutions have been criticised by many countries, scholars and groups of countries as discriminating between peacekeeping forces from sending states that are parties to the Rome Statute and those that are not and being in violation of the Rome Statute which had envisaged deferrals – only on a case by case basis; – only for a limited period of time; – and only when a threat to or breach of peace and security has been established by the UN Security Council under Chapter VII of UN Charter.

V. DECISIONS OF THE ICC PRE-TRIAL CHAMBER I ON THE VISITS TO CHAD AND MALAWI BY PRESIDENT OMAR AL BASHIR OF THE SUDAN

20. The Pre-trial Chamber I of the ICC issued Decision ICC-02/05-01/09 on 18 August 2011 and Decision No.: ICC-02/05-01/09-137 on 19 October 2011 requesting observations from the Governments of Chad and Malawi respectively about the visit of President Omar El-Bashir of The Sudan to those Countries.

21. The Pre-trial Chamber, considering that President Bashir was wanted for two (2) arrest warrants for crimes against humanity, war crimes and genocide issued by the ICC on 4 March 2009 and 12 July 2010 respectively, noted that the Republic of Chad and the Republic of Malawi had a clear obligation to cooperate with ICC in relation to the enforcement of such warrants of arrest, which stems both from the UNSC Resolution 1593 (2005), and from Article 87 of the ICC Statute, to which Chad and Malawi are State Parties.

22. Vide its Decisions, the Pre-trial Chamber invited the competent authorities of the Republic of Chad and the Republic of Malawi to submit any observations in particular with regard to its alleged failure to comply with the cooperation requests issued by the ICC. In this regard, the Commission has learnt that the Government of Chad and the Government of Malawi transmitted their observations to the ICC in September and November 2011. In the said observations, Chad and Malawi underlined, *inter-alia*, their understanding that Article 27 of the Statute which waives the immunities of Head of States and Government is not applicable to the non States Parties to the Rome Statute like The Sudan. They also asserted their obligation to comply with the decisions and policies of the Union.

23. Despite the valid arguments made by Chad and Malawi, the Pre-Trial Chamber I issued, pursuant to article 87(7) of the Rome Statute, Decisions N° ICC-02/05-01/09 of 12 and 13 December 2011, respectively, about the alleged failure of Malawi and Chad to comply with the cooperation requests issued by the ICC with respect to the Arrest and Surrender of the President Omar Al Bashir of the Republic

of Sudan .In the same vein, the Chamber decided to refer the matter to the United Nations Security Council and to the Assembly of States Parties.

24. In this regard, it would be recalled that following the previous Decisions of the ICC Pre-trial Chamber I about the visits of President Bashir in Chad, Kenya and Djibouti, the Assembly decided vide its Decision Assembly/AU/Dec.334(XVI) and Decision Assembly/AU/Dec.366(XVII) respectively that by receiving President Bashir, the Republic of Chad, the Republic of Kenya and the Republic of Djibouti were implementing various AU Assembly Decisions on the warrant of arrest issued by ICC against President Bashir as well as acting in pursuit of peace and stability in their respective regions. The Commission also issued a Press Release asserting that the decision of the ICC was wrong both in law and fact. Accordingly, the Assembly upon the recommendation of the Executive Council may wish to adopt the same approach expressed by the two states.

VI. WARRANTS OF ARREST ISSUED BY THE HIGH COURT IN KENYA AGAINST THE PRESIDENT OF THE SUDAN

25. The High Court in Kenya issued on 28 November 2011, upon the application of a local branch of an international NGO, two warrants of arrest for President Bashir of the Sudan, on the basis of ICC's warrants. The High Court ruled that President Bashir's arrest should be effected by the Attorney General and the Minister for Internal Security should he ever visit Kenya. However, it has come to the attention of the Commission that the Government of Kenya has appealed against the High Court ruling. By the time of finalisation of this report, the hearing of the appeal to the Court of Appeal had not yet taken place. Commission does not have any information on the actions taken by the Government of Kenya with regard.

VII. INVESTIGATIONS AND PROSECUTIONS BY THE ICC IN AFRICA

26. Since its establishment, the ICC has opened investigations in relation to seven (7) situations. All of these situations arise from African States. The seven (7) situations relate to crimes committed or allegedly committed in the Democratic Republic of Congo; Uganda; the Central African Republic (CAR); Sudan (Darfur); Kenya; Libya and Cote d'Ivoire. It is important to note that in the case of CAR, DRC and Uganda, the ICC has exercised jurisdiction on the basis of a referral by the State Party on whose territory the crimes have been committed. Unlike the other three (3) situations described above and the situation in Kenya, the situation in Darfur (Sudan) and Libya relates to a State that is not a party to the ICC Statute. The situations in Darfur and in Libya were referred to the ICC Prosecutor by the United Nations Security Council by virtue of Security Council Resolution 1593 (2005) and Resolution 1970 (2011) respectively.

27. With respect to the situation in Côte d'Ivoire, it should be noted that Côte d'Ivoire, which is not party to the Rome Statute, had accepted the jurisdiction of the ICC on 18 April 2003. More recently on 14 December 2010 and 3 May 2011, the President of the Republic of Côte d'Ivoire reconfirmed the country's acceptance of such jurisdiction. Thus, the former President of Cote d'Ivoire Mr. Laurent Gbagbo accused of crimes against humanity allegedly committed in the context of post electoral violence in Cote d'Ivoire between 16 December 2010 and 12 April 2011 was transferred to the ICC in The Hague (Netherlands) on 30 November 2011 following the arrest warrant issued by the Court on 23 November 2011. The initial appearance

before the Court of Mr. Gbagbo took place on 5 December 2011 while the confirmation of charges hearing is scheduled to start at 18 June 2012.

28. With respect to the work of ICC, it is to be noted that in a Key note address to the mid year meeting and research forum of the American Society of International Law (ASIL) held in Los Angeles (USA) on 4th November 2011, Mr. Louis Moreno-Ocampo, the outgoing Prosecutor of the ICC admitted that there are double standards at the ICC. In this regard, he pointed out that there is “*one standard for 119 member states, and another standard for every other country*”. Addressing the referral of the situation in Libya to the ICC by the UN Security Council but not the situation in Syria, he indicated that the only distinction was the geopolitical position of the two countries. The irresistible conclusion rhymes with that of AU Policy organs that the ICC is becoming the vehicle for the UN Security Council to punish countries that they consider “politically incorrect”.

VIII. OUTCOME OF THE 10TH SESSION OF THE ASSEMBLY OF STATES PARTIES (ASP) TO THE ROME STATUTE OF THE ICC

29. The 10th Session of the Assembly of States Parties to the Rome Statute of the ICC (ASP-ICC) was held at the UN Headquarters in New York, USA, from 12 to 21 December 2011. At the invitation of the Secretariat of the Assembly of States Parties, and in the context of the implementation of the Assembly Decisions on the ICC, a delegation of the African Union Commission (AUC) participated in the said session, in order to work with the Group of African States Parties to ensure that the concerns of the AU and its Members States were properly addressed, as well as to report to the on-going session of the Assembly through the Executive Council.

30. The 10th ASP considered, *inter alia*, the following agenda items: Election of the ICC New Prosecutor, Election of six judges and 2012 Budget Proposals for the ICC.

a) Election of ICC New Prosecutor

31. The Search Committee of the ASP, which had been set up by the ASP at its ninth session in December 2010 and composed of five members representing each of the regional groups, had recommended the following four (4) persons for consideration by the ASP as suitable shortlist candidates for the position of the next Prosecutor of the ICC:

- i) Fatou B. Bensouda, currently Deputy Prosecutor (Prosecutions), International Criminal Court;
- ii) Andrew T. Cayley, currently International Co-Prosecutor, Extraordinary Chambers in the Courts of Cambodia;
- iii) Mohamed Chande Othman, currently Chief Justice of Tanzania;
- iv) Robert Petit, currently Counsel, Crimes Against Humanity and War Crimes Section, Department of Justice, Canada.

32. In this regard, it should be recalled that by virtue of Decision **EX.CL/Dec.664(XIX)** adopted in Malabo, Equatorial Guinea, in June 2011, the Council endorsed the candidature of Ms. Fatou Bomm Bensouda of The Gambia as

the sole African candidate for election to the post of Prosecutor at the International Criminal Court (ICC).

33. Following the consultations undertaken in the context of the ASP Bureau, and the withdrawal of the other candidates, the 10th ASP elected by acclamation Mrs. Fatou Bomm Bensouda of the Republic of The Gambia as the ICC new Prosecutor for a period of nine (9) years starting from 16 June 2012.

b) Election of ICC new Judges

34. In January and June 2011, the Executive Council endorsed two candidates from Nigeria and Mauritius respectively for election as ICC Judges. Despite this endorsement, there were other five candidatures from the following African States Parties: Burkina Faso, Central African Republic, Democratic Republic of Congo, Niger and Sierra Leone. The non-respect of the AU endorsements has had a negative impact on the result of the elections because it was not possible to elect at least two new Judges from African States Parties by the ASP, replacing the two outgoing Judges from Mali and Uganda respectively. The ASP only elected Mr. Chile Eboe-Osuji of the Federal Republic of Nigeria as judge.

IX. RECOMMENDATIONS

35. The Commission would like to make the following recommendations to the Assembly through the Executive Council:

- i) *There is need to explore ways and means to ensure that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of ICC on deferral of cases by the UN Security Council, is adhered to;*
- ii) *The Group of African States Parties in New York and in the Hague as well as the African Members of the United Nations Security Council should follow-up on the implementation of the Assembly Decisions on the ICC in collaboration with the Commission in order to ensure that the African proposals and concerns are properly considered by the UN Security Council and the Assembly of States Parties to the Rome Statute;*
- iii) *The Policy Organs should reaffirm the understanding of the African Union that the Rome Statute establishing the ICC and the UN Security Council are not capable of removing the immunities which international law grants to Senior State Officials such as seating Head of State or Government of Countries that are not party to the Rome Statute.*
- iv) *The policy Organs should decide that by receiving President Bashir, the Republic of Malawi, like Djibouti, Chad and Kenya before her, were implementing various AU Assembly Decisions on the warrants of arrest issued by the ICC against President Bashir;*

- v) *The Policy Organs should underscore the need for all Member States to comply with the Assembly Decisions on the warrants of arrest issued by the ICC against President Bashir of The Sudan pursuant to Article 23 (2) of the Constitutive Act and Article 98 of the Rome Statute of the ICC.*

2012

Progress report of the Commission on the implementation of assembly decisions on the international criminal court (ICC)

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